Supreme Court, U.S.
FILED
MAR 11 2010
OFFICE OF THE CLERK

No. 09-736

IN THE

Supreme Court of the United States

STEVEN A. HUDSON, MICHAEL S. MORGAN, VANESSA R. SPENCER, and JOHN A. WINSLOW,
Petitioners,

v.

UNITED STATES,
Respondent

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

REPLY BRIEF FOR PETITIONERS

Jules Bernstein
Linda Lipsett
BERNSTEIN & LIPSETT
1920 L Street, NW, Suite 303
Washington, D.C. 20036
(202) 296-1798

David T. Goldberg
Counsel of Record
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

Edgar James
JAMES & HOFFMAN
1101 17th St., NW, Suite 510
Washington, D.C. 20036
(202) 496-0500

Sean H. Donahue
DONAHUE & GOLDBERG, LLP
2000 L Street, NW, Suite 808
Washington, D.C. 20036
(202) 277-7085

Counsel for Petitioners

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In the decision below, the Federal Circuit reaffirmed its conclusion in *Bobo,* that an employee's required driving of a work vehicle, controlled by his employer and for the employer's benefit, is not a compensable "principal activity" under § 4(a)(1), unless the employer demands "labor beyond" the required driving.

As the petition explained, the premises of the *Bobo* rule have now been wholly undermined, first by this Court's decision in *Alvarez* – which both affirmed *Steiner*'s "integral and indispensable" test and settled that "[t]here is no plausible argument that ["principal activities"] * * * mean[s] something different" in Sections 4(a)(1) and (2), 546 U.S. at 34 – and now by the Second Circuit's decision in *Singh*, which made clear that its earlier *Reich* decision, whose "interpretation of the [Portal] Act," *Bobo* had purported to adopt, did not in fact construe that statute and did not, as the Federal Circuit had assumed, announce any rule for cases where driving is employer-required.

The petition further showed that the *Bobo* rule, in addition to its basic incompatibility with this Court's decisions, is irreconcilable with the longstanding interpretation of the statute by the Secretary of Labor – and that the magnitude and practical significance of the Federal Circuit's erroneous construction can be seen in the starkly opposite results reached by courts applying the *Steiner/Alvarez* rule.

This Court's intervention is especially warranted, the petition explained, to vindicate Congress's judgment that federal employees' rights be coextensive with private-sector counterparts' and because of the manifest unlikelihood that the Federal Circuit, which has pending before it thousands of claims raising this

very issue, will correct its rule independently and the significant danger that other courts and employers will follow that court into error.

The government's opposition meets little of this head on. It barely mentions the watershed *Singh* decision or the Labor Secretary's long-held interpretation, and its claim of consistency between the Federal Circuit decisions and this Court's is understandably perfunctory. The opposition expends much more energy arguing about the character of the circuit split and attempting to re-cast the Federal Circuit's opinions, supplying not only fresh legal reasoning, but significantly revised factual statements, as well.

None of these efforts succeeds, let alone detracts from the need for certiorari. That the government resorts to such unconventional surgery is itself testimony to the seriousness of the problems afflicting the Federal Circuit's rule.

A. Although the government (Opp. 9-10) assures the Court "[n]othing in [the Federal Circuit's] decisions suggests" a two-tier interpretation, asserting that "the court of appeals applied the correct legal standard" does not make it so. The opinion in *Adams* actually described its holding as following from a Portal Act rule "specific[] to vehicular travel," 471 F.3d at 1325, and in none of the three decisions did the Federal Circuit even purport to apply the "integral and indispensable" standard for § 4(a)(1) "principal activities." While *Bobo* may have *cited Steiner*, Opp. 10, it announced it would *follow* the Second Circuit's "interpretation" in *Reich*, which pre-dated *Alvarez*'s announcement of the unitary "principal activity" interpretation and had dismissed *Steiner* as

"offer[ing] little guidance as to the meaning of the term 'principal activity or activities,'" 45 F.3d at 649.

The government's claim (Opp. 7) to have found *support* in *Alvarez* for the Federal Circuit rule is mistaken. In the same passage the government cites, which declines to hold waiting to don protective gear a "principal activity," the Court proceeds to explain that the Portal Act "analysis would be different if [the employer] *required* its employees to arrive at a particular time in order to begin waiting," 546 U.S. at 40-42 & n.8 (emphasis added, citing 29 C.F.R. § 790.7(h)).

This distinction, of course, is precisely the one the *Bobo* rule ignores. Like waiting, and clothes-changing, *normal* travel between home and work is merely a "necessary" incident of employment. But *required* driving is different.[1]

Indeed, while required waiting – which *Alvarez* indicated *is* compensable – arguably is "two steps removed from productive activity," 546 U.S. at 42, the activity here, driving, is *itself* work *and* essential to the performance of other job requirements. That is why

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[1]The government's claim that "[e]ven before Congress enacted the Portal-to-Portal Act * * * this Court indicated that 'traveling from workers' homes to [the workplace]' does not qualify as 'work,'" Opp. 7 (quoting *Anderson*, 328 U.S. at 691-692), repeats this mistake. The early decisions involved *optional* (entirely passive) riding, not employer-required driving. Indeed, it was on that basis that the courts denied compensation. See *Walling* v. *Peavy-Wilson Lumber Co.*, 49 F. Supp. 846, 882 (W.D. La. 1943) ("The defendant * * * does not require any employee to use" its transport); *Dollar* v. *Caddo River Lumber Co.*, 43 F. Supp. 822, 823 (W.D. Ark. 1941) (same).

time spent performing this specific activity had, for decades prior to *Bobo*, been recognized as "hours worked." See 45 Fed. Reg. 85,659, 85,661 (Dec. 30, 1980) (describing OPM rule as "consistent with the rulings, interpretations, and opinions of the Department of Labor and the courts in the private sector").

The government offers no explanation how the *Bobo* rule could be consistent with the "principal activity" *holding* in *Steiner*. The requirement in that case did not originate with the employer, and as the petition noted, the clothes-changing and showering surely benefitted the employee more directly than the employer. (The government appears to respond by suggesting that *Steiner* left the "benefit" question open – and might yet be limited to its facts, Opp. 8 n.2). And changing out of clothes is hardly more "indispensable" than driving deemed "essential" – and closely connected – to performance of job duties.

B. Unable to point to evidence in the Federal Circuit opinions of its applying *this Court's* Portal Act test, the government (Opp. 5) posits it applied the Second Circuit's *Reich* version.

But as the petition explained, *Reich* did not involve required driving, and the Second Circuit has now clarified that it did not interpret the Portal Act at all. (Nor did it anticipate cases emphasizing deference to administrative construction, see *Long Island Care at Home Ltd.* v. *Coke*, 551 U.S. 158 (2007)).[2]

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[2]The Opposition (at 14 n.6) accuses petitioners of exaggerating the differences between the cases, saying that "[a]s a practical matter, unless the handler had someone to drive him, he was required to drive." But the *Second*

But even if, as the *Bobo* court wrongly assumed, *Reich* had announced a Portal Act standard for required driving cases (and one in line with *Alvarez*), the Federal Circuit rule could still not be explained or defended as an application of the *Reich* "test." The Federal Circuit's three opinions are devoid of findings – or legal conclusions – respecting any of the *Reich* "factors." And that is no small matter, because in these cases, in which the employer was granted judgment as a matter of law, all three factors – employee choice, indispensability, and employer benefit – plainly *favor* compensation.

C. It is a testament to the difficulty of squaring the Federal Circuit legal rule with this Court's teaching that the Opposition undertakes to reinterpret the *facts* of its cases. The government tells the Court:

> Neither this case, *Adams*, nor *Bobo*, * * * ***involve a requirement that employees commute, nor do they involve a benefit to the government from the employees' commuting.*** The requirement in question is ***only*** that when the employees commute, they utilize government vehicles for this purpose.

Opp. 11 (emphasis added). See also *id.* 8 (describing driving as "accommodat[ing] the employee's choice of where to live"); *id.* 17 (petitioners "received a government car * * * on certain conditions").

But facts are stubborn things, and to the extent these ostensible restatements are given their natural

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Circuit did not treat the case as involving required driving, and the practice of car pooling is less exotic than the government assumes. And in *Reich*, there was no rule prohibiting driving with family members or doing personal business on the way to work and back.

meaning – *i.e.*, that the driving at issue was a matter of employee choice, not employer mandate – they are inaccurate.

The *Bobo* opinion states plainly that employees were "*required* * * * to have their dogs reside with them," 136 F.3d at 1466-67, and "*require[d]* * * * to * * * transport" the dogs between "their homes and * * * work locations * * * * [in] specially-equipped vehicles," *id.* (emphasis added). And *Adams* summarized:

> The plaintiffs are issued government-owned police vehicles and ***required as a condition of their employment to commute from home to work in those vehicles.*** This requirement facilitates their ***employers'*** law enforcement ***missions***.

471 F.3d at 1323 (emphasis added).

As for "benefit," at oral argument in *Adams*, the United States forthrightly acknowledged that the driving at issue:

> may benefit the employee in a lot of ways, but we don't dispute ***that the reason it's required is because the government gets enough of a benefit from it that the government chooses to require it.***

Tr. Oral Arg. (Nov. 8, 2006) at 35. Accord 31 U.S.C. § 1344(a)(2)(B),(e)(2) (government vehicles may be driven to employees' homes only if "essential for the safe and efficient performance of * * * law enforcement duties" or it "will substantially increase the efficiency and economy of the Government"); see also *id.* § 1344(e)(1) (unlawful to provide a vehicle for employee "comfort and convenience").

The government's assertion of employee choice – that "commuting" is not "required" – is true only in the literal, entirely trivial sense that employees are not "required" to reside somewhere other than where they work. But the *activity* at issue, driving the employer's vehicles and equipment home, is one employees *must perform* whether they *wish* to or not.[3]

D. In explaining why review is warranted, the petition identified many decisions that have interpreted and applied "principal activities" in Section 4(a)(1) in a manner consistent with this Court's instructions in *Steiner* and *Alvarez* – and therefore at odds with *Bobo*.

The government's response, focused on minimizing the "circuit split" and disparaging its technical "quality," is incorrect on its own terms and misses the larger point.

1. The government builds its argument mostly on the truism that a uniform rule will yield different results in different circumstances. See Opp. 13. But the decisions cited rely on legal standards obviously different from the Federal Circuit's. While the decision below treats required driving "done for the employer's benefit, under the employer's rules" as noncompensable (absent further duties), the Fifth Circuit has held that Section 4(a) *only* exempts activities undertaken "for [employees'] own

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[3]Even if understood as asserting that the *length* of an employee's driving is not employer-mandated, it is not correct; the government *does* mandate the amount of driving: it requires employees to drive its vehicles to their homes, irrespective of where they live, so they may fulfill work responsibilities.

convenience, [and neither] * * * required by the employer [nor] * * * necessary for the performance of their duties," *Dunlop*, 527 F.2d, 394, 398 (5th Cir. 1976). And that formulation is the one the government relies on in its role as enforcer of the statute. See Pet. 28-29. Likewise, questions the Tenth Circuit treats as dispositive to the § 4(a)(1) "principal activity" analysis are ones the Federal Circuit treats as irrelevant, see *Baker*, 146 F.3d at 1219.

As the petition showed (18-21), courts applying Fifth and Seventh Circuit law have reached results directly opposite to the Sixth and Federal Circuits *in cases involving essentially identical facts*, and circumstances the *government* suggests are legally relevant make petitioners' claim of "principal activity," rejected at the threshold under the Federal Circuit rule, far *stronger* than ones that succeeded in other courts.

Even the government does not seriously contend that the Federal Circuit's rule is consistent with *Singh*, in which the court described the required carrying of a briefcase on the subway as "pushing the limits on the burdens [an employer] may impose * * * * before it must pay [employees] for [commuting] time," 524 F.3d at 369.

2. The government notes (Opp. 12-13) that not all the decisions involved driving between home and work. But decisions of the Ninth and Tenth Circuits (as well as district court decisions in *Graham* and *Karr*) did;[4] the Secretary of Labor repeatedly has brought – and

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[4]Although the government stirs up dust about the facts of *Baker*, see Opp. 13 & n.4, the opinion leaves little doubt that the driving was "home-to-work."

prevailed in – enforcement actions in those circumstances; and the opposition unduly minimizes, but cannot deny, that for decades the government-wide rule for federal employees set out circumstances in which time spent driving between "home [and] work" would be "hours worked." See App.63a-64a. The text of § 4(a)(1) speaks to "traveling to and from" the workplace, without specifying the point of origin or terminus. And that the "employer-specified location," Opp. 13 n.3, for driving its vehicle is an employee's home does not make the requirement necessarily less burdensome.

3. The government (Opp. 12) asks the Court to see significance in the absence of a "precedential" appeals court opinion affirming a judgment for plaintiffs. But there is much less to this than is implied. The Tenth Circuit in *Baker* reversed a jury verdict for employers, and employers in the Fifth and Seventh Circuits did not even appeal district court decisions granting employees summary judgment.

This is not an area of the law where there is benefit in allowing judicial disagreement to "percolate." That presumably is why the court in *Singh* did not stop at affirming judgment for the employer, but instead offered guidance: To encourage employers to comply with the law – and thereby make it less likely that "future decisions of the Second Circuit," Opp. 14, would be needed.

Indeed, no valid interest would be served by requiring federal employees to wait for employers elsewhere to defy circuit law and DOL construction, lose in district court and on appeal.

4. The reasons for settling the issue here, in contrast, are compelling. The magnitude of divergence

between the competing interpretations is itself a serious problem, especially because federal employees are relegated to the (erroneous) less-protective rule, and because that rule fails to respect the Secretary of Labor's role in administering the statute.

Moreover, a case directly raising this question, affecting thousands of individual employees, is currently pending in the Federal Circuit. And as the opinion below attests, that court shows no inclination to reconsider its rule, even in the face of *Alvarez* and *Singh*, effectively according *de facto* precedential effect to the certiorari denial in *Adams*.[5]

Finally, leaving the decision in place risks unfairness for employees outside the Federal Circuit. The Federal Circuit's cases are reminiscent of the children's game "telephone," with each successive iteration rendering the initial "message" increasingly unrecognizable. As noted, it is doubtful that the original *Reich* decision was fully consistent with *Alvarez* or with decisions requiring deference to agency construction; *Bobo* then announced a rule, to avoid "conflict" with *Reich*'s "interpretation of the [Portal] Act," that fundamentally misunderstood the Second Circuit's decision. *Adams* extended that error and misread other statutory language; and the decision

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[5]The government likewise hints that denial in *Adams* should control here, claiming there has been no significant "intervening [event]," Opp. 6. But the post-*Adams Singh* decision has washed away the remaining foundations of the *Bobo* rule; and in *Adams*, the government identified case-specific "[j]urisdictional defects" not alleged here as a reason for denying review. Opp., No. 07-116 at 19.

below adhered to these on grounds of "*stare decisis.*"[6] Decisions elsewhere have begun to replicate and extend these errors. See *Rutti* v. *LoJack Corp., Inc*, 2010 WL 699946, *5 (9th Cir. 2010) (relying on *Bobo* in interpreting other statutory language).

E. The petition identified two additional aspects of the Federal Circuit's rule warranting this Court's review: (1) its avowedly differential treatment of FLSA "*exceptions*" – like the Portal Act – and "*exemptions*" and (2) its reliance on a broad, substantive version of the "de minimis" doctrine.

1. As to the first, the government declines even to acknowledge the conflict of authority – or to defend the Federal Circuit's rule. Rather, it attacks a straw man, denying that "everything an employee does is presumed to be compensable work if the employee so characterizes it." Opp. 18. But that is not petitioners' position – or that of the courts of appeals that have rejected the odd rule relied upon below. Rather, it is that when, as here, the employer's claimed relief from the FLSA compensation obligation depends on an "exception," the same rules that govern "exemptions" should apply.

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[6]These misunderstandings have migrated to the regulatory arena – and back. What the court below touted as "authoritative interpretation," App. 12a, is unsigned, undated – generic – text appearing on an OPM web page, which cites *Bobo*, but nowhere mentions the detailed, government-wide rules, affirmed through notice-and-comment rulemaking, it supposedly "supersed[ed]," Opp. 16. The government now defends the Federal Circuit rule as evincing due "deference."

2. The government stops far short of defending the Federal Circuit's "*de minimis*" reasoning, saying only (Opp. 17) there may be "way[s]" other than in time-keeping that "a '*de minimis*' concept might have relevance." But whether or not cases like *Anderson* exhaust the possible "relevance" of the "concept," courts and the government have been careful not to give the extra-statutory de minimis doctrine an expansive scope. See *Dole* v. *Enduro Plumbing, Inc.*, 1990 WL 252270, *6 (C.D. Cal. 1990) ("the *de minimis* doctrine * * * become[s] an issue only after it is first determined that the time is compensable in character"); *Lindow* v. *United States*, 738 F.2d 1057, 1062 (9th Cir.1984) (rule "is concerned with the practical administrative difficulty of [time] recording").

As the Labor Department explained in *Alvarez*, the *de minimis* rule can "thwart[] the purposes of the FLSA," because "almost any activity can be broken down into [noncompensable] constituent parts." Amicus Br., No. 04-66 at 26-27. That danger is dramatically illustrated here. Not only does *Bobo*'s "*de minimis*" analysis consider restrictions and burdens separately, but it inexplicably omits from the calculus the manifold, significant burdens inherent in requiring employees to *drive* work vehicles and equipment between work and home, rather than take public transportation, ride as passengers, or drive their own cars.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

Jules Bernstein
Linda Lipsett
BERNSTEIN & LIPSETT
1920 L St., NW, Suite 303
Washington, D.C. 20036
(202) 296-1798

David T. Goldberg
Counsel of Record
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Fl.
New York, N.Y. 10013
(212) 334-8813

Edgar James
JAMES & HOFFMAN
1101 17th St., NW, Suite 510
Washington, D.C. 20036
(202) 496-0500

Sean H. Donahue
DONAHUE & GOLDBERG, LLP
2000 L Street, NW, Suite 808
Washington, D.C. 20036
(202) 466-2234

MARCH 2010